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Nos. 96-1579 and 96-7999

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES BROGAN, PETITIONER

v.

UNITED STATES OF AMERICA

REINALDO ROMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether there is an exception to criminal liability under 18 U.S.C. 1001 for a false statement that consists of an "exculpatory no."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13)[1] is reported at 96 F.3d 35.

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[1] Unless otherwise noted, references are to the appendix to the petition in No. 96-1579.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1996. Petitions for rehearing were denied on November 15, 1996. Pet. App. 16-17. The petition for a writ of certiorari in No. 96-1579 was filed on February 13, 1997, and docketed on April 7, 1997. The petition in No. 96-7999 was filed on February 25, 1997, and is therefore out of time under this Court's Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of unlawfully receiving money from an employer, in violation of 29 U.S.C. 186(a)(2), (b)(1), and (d)(2), and of making false statements to federal investigators, in violation of 18 U.S.C. 1001. Petitioners Brogan and Roman were sentenced to nine and six months' imprisonment, respectively, to be followed in each case by two years of supervised release. Each petitioner was also fined $4,000. 96-7999 Pet. App. A7. The court of appeals affirmed.

1. Petitioners were officers of a union local. Pet. App. 2. On various occasions they accepted cash payments from JRD Management Corporation (JRD), a real estate management concern that employed union members. See Gov't C.A. Br. 9-17; Pet. App. 3-4. In March 1993, federal agents visited petitioner Roman's home. Pet. App. 2. After identifying themselves, the agents informed petitioner that he was the subject of a federal investigation and that they had a subpoena requiring his appearance before a grand jury. Petitioner agreed to answer the agents' questions and invited them into his home. *Id.* at 2-3. After eliciting

a variety of background information, the agents asked petitioner how much cash JRD had given him at Christmas in various years, to which he replied "Nothing." The agents then inquired whether petitioner had received cash at other times during the year, to which he replied "None." *Id.* at 3; 96-7999 Pet. 5. Petitioner acknowledged that he knew that lying to federal agents was a crime, but he declined to retract or modify his answers to the agents' questions. Pet. App. 3; see Gov't C.A. Br. 18-19.

In October 1993, federal agents paid a similar visit to the home of petitioner Brogan. Pet. App. 3. After identifying themselves and informing petitioner that they were investigating JRD and various individuals, the agents informed petitioner that if he wished to cooperate with the investigation he should have an attorney contact the United States Attorney's Office. *Ibid.*; see Gov't C.A. Br. 19. Petitioner then agreed to answer the agents' questions. Among other things, the agents asked petitioner whether he had received any cash or gifts from JRD, to which he responded "No." The agents then told petitioner that they had seized JRD records indicating that he had received cash from the company, and they warned him that lying to federal agents in the course of an investigation was a crime. The interview ended shortly thereafter, and Brogan did not modify his answers. Pet. App. 3-4.

Petitioners were tried together, along with several co-defendants. The jury convicted each petitioner of accepting unlawful cash payments and of making false statements to government investigators.

2. The court of appeals affirmed. Pet. App. 1-13. The court disposed of most of petitioners' contentions in an unpublished opinion (96-7999 Pet. App. A7-A10),

and petitioners do not renew those contentions in this Court. The court issued a separate published opinion, however, rejecting petitioners' attempt to rely on the "exculpatory no" exception that some courts have recognized as a defense to criminal liability under 18 U.S.C. 1001.

At the time petitioners made their false statements, Section 1001 generally prohibited, among other things, the making of "any false, fictitious or fraudulent statement[] or representation[]" in "any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1001 (1988).[2] As the court of appeals explained (Pet. App. 5-6, 11-12), however, several courts have adopted various versions of an "exculpatory no" exception to liability under Section 1001, holding generally that the law does not reach "false statements that are essentially exculpatory denials of criminal activity" (*id.* at 5). The court of appeals in this case agreed with petitioners that their statements to federal investigators "constitute[d] true 'exculpatory no's' as recognized in other circuits," but it declined to recognize any version of the "exculpatory no" exception. *Id.* at 6.

The court found "no support" for such an exception in the language of Section 1001. Pet. App. 6-8. The court rejected the argument that a defendant who "merely answers an inquiry in the negative" (*id.* at 6-

[2] In 1996, in response to this Court's decision in *Hubbard* v. *United States*, 115 S. Ct. 1754 (1995), Congress amended Section 1001 to clarify its language and extend its scope. False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459. The appendix to this brief sets forth (at 1a-2a) the text of Section 1001 both at the time that petitioners made their false statements and as amended in 1996. The 1996 changes do not affect the question presented in this case.

7) has not made a "statement" within the meaning of the provision, holding instead that "an exculpatory utterance, whether 'no' or something more elaborate, is a 'statement' within the purview of the statute" (*id.* at 8). Similarly, the court's review (*id.* at 8-10) of the history of Section 1001's enactment and amendment over the years disclosed no support for the conclusion reached by other courts that the law's "broad language generally prohibiting false statements of any sort cannot be taken at face value" (*id.* at 10). The court found no basis for believing that a plain-language interpretation of Section 1001 would infringe any right protected by the Fifth Amendment's privilege against compelled self-incrimination, because "the Fifth Amendment has no application to circumstances in which a person lies instead of remaining silent." *Id.* at 11.

The court noted that Section 1001 "embodies a willfulness requirement." Pet. App. 12. Although the court did not decide whether the government must show that a defendant knew that the law prohibits false statements, it cautioned that its rejection of the "exculpatory no" doctrine was not "intended to suggest that the mere denial of criminal responsibility would be sufficient to prove such an element." *Id.* at 13. The court also did not "exclude the possibility that a trier of fact might acquit on the ground that a denial of guilt in circumstances indicating surprise or other lack of reflection was not the product of the requisite criminal intent." *Ibid.* In this case, however, the court noted that "the agents testified that they informed [petitioners] that such false statements were illegal and that [petitioners] answered the questions in circumstances suggesting delibera-

tion." *Ibid.* The court therefore affirmed petitioners' convictions. *Ibid.*

DISCUSSION

1. The court of appeals correctly refused to recognize the judicially crafted "exculpatory no" exception to 18 U.S.C. 1001. The plain language of that Section imposes criminal liability on anyone who "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations." 18 U.S.C. 1001 (1988).[3] That language applies by its terms to petitioners' statements to government investigators.

Some courts have reasoned that a defendant's mere denial of guilt is not a "statement" within the meaning of Section 1001. See Pet. App. 6-7. The court of appeals correctly rejected that argument "as a matter of common sense and plain meaning." *Id.* at 7. Nor does anything in Section 1001's history suggest that Congress intended the provision to be applied more narrowly than a natural reading would allow. See *id.* at 8-10; *United States* v. *Rodriguez-Rios*, 14 F.3d

[3] See note 2, *supra*. As recently amended, Section 1001 applies generally to anyone who "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully * * * makes any materially false, fictitious, or fraudulent statement or representation." See False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459 (amending 18 U.S.C. 1001). The amended provision includes exceptions for certain matters within the jurisdiction of the Judicial and Legislative Branches. There is no exception for any matter within the jurisdiction of the Executive Branch, such as the investigation during which petitioners were questioned.

1040, 1048 (5th Cir. 1994) (en banc) ("[E]ven if it were necessary to go beyond the statute's plain meaning, the 'exculpatory no' exception defies the legislative history of § 1001."). And the Fifth Amendment poses no obstacle to the enforcement of a provision that punishes only "knowing[] and willful[]" lies. Under these circumstances, as this Court said when it recently considered Section 1001, "[the courts'] obligation is to apply the statute as Congress wrote it." *Hubbard* v. *United States*, 115 S. Ct. 1754, 1759 (1995).

As petitioners point out (96-1579 Pet. 2-3; 96-7999 Pet. 6-8), however, and as the court below recognized (Pet. App. 4-6, 11-12), the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted one version or another of the "exculpatory no" exception. See Pet. App. 6 and cases there cited; *United States* v. *Moore*, 27 F.3d 969, 978 & n.6 (4th Cir.) (collecting cases), cert. denied, 513 U.S. 979 (1994). Although there is considerable variation in the way the exception is applied (see Pet. App. 11-12), petitioners' simple denials of incriminating conduct in response to questions posed by government investigators would probably satisfy the requirements for the exception in most courts that have adopted it. See, *e.g.*, *United States* v. *Becker*, 855 F.2d 644, 646 (9th Cir. 1988) (setting out five-part test); but see *United States* v. *King*, 613 F.2d 670, 674 (7th Cir. 1980) (exception does not apply if defendant was aware that he was under investigation). It is clear, however, that the Fifth Circuit would have joined the court below in rejecting petitioners' argument. *United States* v. *Rodriguez-Rios*, *supra*; see also *United States* v. *Solis*, 46 M. J. 31 (C.A.A.F. 1997) (declining to recognize any "exculpatory no" exception to 10 U.S.C. 907, the military analogue to 18 U.S.C. 1001).

These cases therefore squarely present the conflict among the courts of appeals over the existence of an "exculpatory no" defense.

That conflict in the circuits warrants resolution by this Court. It is true that the government's general policy on the prosecution of cases involving false statements to federal criminal investigators is that "it is not appropriate to charge a Section 1001 violation where a suspect, during an investigation, merely denies his guilt in response to questioning by the government." United States Attorney's Manual § 9-42.160 (adopted Feb. 12, 1996) (set forth in full at App., *infra*, 3a-4a).[4] That policy, together with the narrow contours of the "exculpatory no" exception even in those courts that recognize it, limits the number of cases in which the issue arises; and, even

[4] The government has had a similar policy for many years. See Memorandum for the United States at 8, *Nunley* v. *United States*, No. 77-5069 (filed Nov. 1977). In *Nunley*, after noting that the Section 1001 prosecution in that case had not been authorized by the Department under the policy then in effect, and that "[i]n the implementation of that policy the Department has normally refused permission to prosecute where an individual's false statements to any agency investigating possible criminal offenses essentially constitute mere denials of guilt," we requested that the Court vacate the judgment of the court of appeals and remand the case with directions to dismiss the indictment. *Id.* at 7-8. The Court did so. *Nunley* v. *United States*, 434 U.S. 962 (1977). After the Fifth Circuit rejected the existence of the "exculpatory no" doctrine in 1994, the Department suspended its prior policy and reevaluated the issue. The current policy was adopted on February 12, 1996. The policy is a guideline for the use of the Department's prosecutors; it does not represent the Department's construction of Section 1001, nor does it create judicially enforceable rights. See, *e.g.*, *United States* v. *Piervinanzi*, 23 F.3d 670, 682-683 (2d Cir.), cert. denied, 513 U.S. 900, 904 (1994).

in those cases, the exception is invoked far more often than it is actually applied.

Nonetheless, as these and other recent cases demonstrate, the government does occasionally bring prosecutions that can be characterized as involving a defendant's "exculpatory no" to federal criminal investigators. In addition, because of the complicated and inconsistent rules that apply in circuits that have recognized the "exculpatory no" defense (see Pet. App. 11-12), and because some courts have declined to take a firm position on the issue (see, *e.g.*, *United States* v. *LeMaster*, 54 F.3d 1224, 1227-1230 (6th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996)), the issue gives rise to disputes over whether a particular defendant's false denial of guilt is subject to prosecution under Section 1001. While the defense is rarely successful, the incorrect appellate decisions recognizing any version of the doctrine thus generate a considerable amount of unproductive litigation.[5]

Two courts of appeals—including the Fifth Circuit, which created the doctrine in the first place (see Pet. App. 6)—have now rejected the "exculpatory no" doctrine in its entirety, resulting in a conflict among the circuits. These cases squarely present the issue, which is certain to recur, and the matter warrants resolution by this Court.

2. The petition in No. 96-7999 was filed out of time under this Court's Rule 13.1. See page 2, *supra*;

[5] The "exculpatory no" doctrine is also similar in some respects to a rule recently adopted by the Federal Circuit for federal employee disciplinary cases, which we have challenged in our petition for a writ of certiorari in *King* v. *Erickson*, No. 96-1395 (filed Mar. 4, 1997). We have provided petitioners in these cases with copies of our petition in *King*.

96-7999 Pet. 2. While the time limit established by that rule is not jurisdictional, *Schact* v. *United States*, 398 U.S. 58, 63-64 (1970), petitioner's failure to meet it would ordinarily be an appropriate ground on which to deny further review. We do not urge that course in this instance, however, because the petition in No. 96-1579, which presents the same question and seeks review of the same judgment, appears to have been timely filed.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1997

APPENDIX

1. As in effect at the time of petitioners' false statements, 18 U.S.C. 1001 (1988) provided:

§ 1001. Statements or entries generally

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2. As amended by the False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459, 18 U.S.C. 1001 now provides:

§ 1001. Statements or entries generally

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any

materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

3. The United States Attorney's Manual, Title 9, Chapter 42, § 9-42.160 (adopted Feb. 12, 1996) states:

9-42.160 False Statements to Federal Criminal Investigators

By its plain terms, 18 U.S.C. § 1001 broadly reaches "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations * * *." Although the statute does not provide for exceptions, a number of courts of appeal have held that it does not apply to cases involving simple false denials of guilt in response to government initiated inquiries. *See, e.g., United States v. Taylor*, 907 F.2d 801 (8th Cir. 1990); *United States v. Eguihua-Juarez*, 851 F.2d 1222 (9th Cir. 1988); *United States v. Cogdell*, 844 F.2d 179 (4th Cir. 1988); *United States v. Fitzgibbon*, 619 F.2d 874 (10th Cir. 1980); *United States v. King*, 613 F.2d 670 (7th Cir. 1980); *United States v. Chevoor*, 526 F.2d 178 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976). These courts have concluded, inter alia, that mere denials of guilt do not impair the basic functions of the agency to which the statement is made.

Other courts have rejected the "exculpatory no" exception to 18 U.S.C. § 1001. *See, e.g., United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994) (en banc); *United States v. Steele*, 933 F.2d 1313 (6th Cir.) (en banc), *cert. denied*, 502 U.S. 909 (1991). In addition, a few courts have neither adopted nor rejected the "exculpatory no" doctrine. *See, e.g., United States v. Barr*, 963 F.2d 641 (3d Cir.), *cert. denied*, 113 S. Ct. 811 (1992); *United States v. Cervone*, 907 F.2d 332, 342 (2d Cir. 1990); *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989).

It is the Department's policy that it is not appropriate to charge a Section 1001 violation where a suspect, during an investigation, merely denies his guilt in response to questioning by the government. This policy is to be narrowly construed, however; affirmative, discursive and voluntary statements to federal criminal investigators would not fall within the policy. Further, certain false responses to questions propounded for administrative purposes (e.g., statements to border or INS agents during routine inquiries) are also prosecutable, as are untruthful "no's" where the defendant initiated contact with the government in order to obtain a benefit.

Prior consultation with the Criminal Division is not required before initiating prosecutions for false statements to federal investigators. However, the Fraud Section is available for consultation on any case that involves application of these principles.